84-1987

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILHELMINA MOORE,

Petitioner-Appellant

v.

HENRY E. BONNER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS FOR BERKELEY COUNTY AND CHAIRMAN OF THE BERKELEY COUNTY BOARD OF EDUCATION: MARVIN WIGGINS, JOSEPH MYERS, HAROLD STALEY, GRAYDON GRAY, JAMES BARRY, CAROLYN LEWIS, DOROTHY BRYAN, DAVID FASHION, J P. PEAGLER, AND ROY STRICKLAND, EACH INDIVIDUALLY AND EACH IN HIS OR HER OFFICIAL CAPACITY AS A MEMBER OF THE BERKELEY COUNTY BOARD OF EDUCATION AND THE BERKELEY COUNTY SCHOOL DISTRICT,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

1. Did the Court of Appeals fail to find that Appellant's Right of Due Process was not protected by the Berkeley County Board of Education?
2. Did the Court of Appeals fail to find that the Berkeley County School Board could not sit as an objective appeals panel in judging a Decision that it had previously rendered?
3. Did the Court of Appeals fail to find the District Court's failure to afford me due process of the law of the United States or due process of the defendenats own policy?
4. Did the Court of Appeals fail to find that the District Court failed to allow my lawyers to present directly to the Jury, proof of non-compliance by the defendants with the August 1981 Court Order requiring the desegregation of the Berkeley County School District?

5. Did the Court of Appeals fail to find that the District Court failed to charge the Jury that the School District has a recent history of racial discrimination or intentional segregative action within the District?

6. Was the Appellant improperly represented by counsel before the District Court?

PRELIMINARY STATEMENT

Petitioner appeal from a final Order of the Fourth Circuit Court of Appeals, made March 24, 1985, affirming the decision below of the United States District Court for the District of South Carolina, at Charleston, which awarded judgment to the respondents and dismissed the complaints.

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SUMMATION - STATEMENT OF THE CASE

Point I

I sued the Board of Education because they denied renewal of my contract as Guidance Counselor after 17 years of service. The reason given--"insubordination."

Accordingly, I was dismissed from my position as a guidance counselor after a hearing before the School Board.

The defense was that these were insufficient evidence to justify the conduct being termed "insubordination."

This was a total lack of due process of law by the Board of Education.

Point II

The matter was appealed to the District Court.

After a charge to the Jury, by the Judge, that the proof of discrimination must be "clear and convincing," the Jury rendered a Verdict in favor of the School Board.

This was only one of the grounds of

complaints contained in my petition not adequately reviewed or covered by either the Board or the District Court was the Complaint of Violation of due process rights.

In addition, my attorney had failed to present certain evidence which was beneficial to my case.

Point III

The decision by the Fourth Circuit Court of Appeals Affirming the District Court should be reversed.

There has been no determination made by either the School Board or the District Court or the Fourth Circuit Court of Appeals concerning my complaint that my rights to due process have been violated.

My argument that there was never sufficient evidence presented to justify the ruling of "insubordination" has never been adequately ruled upon by any Tribunal.

As before stated, my attorney did not present the evidence that I sought to offer

in support of my position. As is well known, one has a right to counsel, which of course infers competent counsel. In my judgment counsel refusal to follow my instructions left the tribunal with missing evidence. This action very well could have seriously damaged my presentation.

These documents obtained pursuant to my investigation did assert that certain former Black school teachers had been discharged without due process of the law. Although some did have a hearing, some did not have a hearing. The cases were nonetheless similar to my situation as these depositions were being offered in evidence for the purpose of showing that the Board could well have a policy of discharging Black school teachers in an arbitrary manner which did violate the due process rights of those individuals.

REASONS FOR GRANTING THE WRIT

IN THE

SUPREME COURT OF THE UNITED STATES

I, Wilhelmina Moore, respectfully ask the United States Supreme Court to hear the case based upon the violation of the Constitutional Laws:

1. The Court of Appeals failed to find that my rights of Due Process of the law were not protected by the Berkeley County School Board.

2. The Court of Appeals failed to find that my Constitutional Rights were violated in that the School Board served as Judge of a decision that it had previously rendered and as decision-makers who have a substantial interest in the outcome.

3. The Court of Appeals failed to find the District Court's failure to afford me due process of the laws of the United States or the due process laws of the defendant.

4. The Court of Appeals failed to find that the District Court failed to allow my

lawyers to present directly to the Jury, proof of non-compliance by the defendants with the August, 1981 Court Order requiring the desegration of the Berkeley County School District.

5. The Court of Appeals failed to find that the District Court failed to charge the Jury that the School District has a recent history of racial discrimination or intentional segregative action within the District.

6. The Appellant was improperly represented by counsel at the District Court.

CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the foregoing instrument have been served on Mr. R. Markley Dennis, Jr., Dennis, Dennis & Watson, 337 E. Main Street-Box 1174, Moncks Corner, SC 29461 and three true and correct copies to Mr. Kenneth L. Childs, David T. Duff, Post Office Box 11367, Columbia, SC 29211 by the United States Mail, Postage pre-paid on the _____ day of _____.

_____
Wilhelmina Moore

CONCLUSION

Petitioner respectfully prays that this Court reverse the order of the Fourth Circuit Court of Appeals and find for the appellant.

Respectfully submitted,

_____

Petitioner-Appellant

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

Wilhelmina Moore,

Plaintiff,

vs.

Henry E. Bonner, et al.

Defendants.

Civil Action No. 80-1540-1

ORDER

STATEMENT

On August 15, 1980, Plaintiff, Wilhelmina Moore, commenced this action by filing her Complaint.[1] The action came on for jury

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[1]The Complaint, as plead, sets forth the following causes of action:

1. Fifth Amendment claim for violation of substantive and procedural due process rights;

2. Fourteenth Amendment claim for violation of substantive and procedural due process rights in connection with the hearing granted Plaintiff by the Defendant Board;

3. Thirteenth Amendment claim for race discrimination;

4. Fourteenth Amendment claim for race

trial on February 21, 1984. At the close of the case, Defendants' counsel renewed their motion under Fed. R. Civ. Proc. 50(a) for a directed verdict on Plaintiff's claims.

After considering the testimony and exhibits and hearing the arguments of counsel, the court directed a verdict for the Defendants on Plaintiff's First Amendment and

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[1] (continued)

discrimination;

5. First Amendment claim for violation of right to free speech and association;

6. A claim under 42 U.S.C. § 1981 for violation of the same right to contract as enjoyed by white persons;

7. Conspiracy claim to violate Plaintiff's constitutional rights under 42 U.S.C. § 1985.

Plaintiff's Fifth and Thirteenth Amendment claims have already been dismissed by the court's prior order of November 5, 1981. See Moore v. Bonner, 526 F. Supp. 143, 145 n.1 (D.S.C. 1981), rev'd on other grounds, 695 F.2d 799 (4th Cir. 1982). Plaintiff's counsel concedes that the court's dismissal of these claims has not been appealed and therefore the court's prior order is the law of the case.

Fourteenth Amendment procedural due process claims. The court issues this Order setting forth the basis for its rulings.

FINDINGS OF FACT

1. The Plaintiff, Wilhelmina Moore, was employed by the Berkeley County School District from the 1959-60 school year through the 1965-66 school year and from the 1969-1970 school year through the 1979-80 school year.

2. Defendant Henry E. Bonner is the Superintendent of the Berkeley County School District and was serving in this capacity at the time of the nonrenewal of Plaintiff's contract.

3. Defendants Marvin Wiggins, Joseph Myers, Harold Staley, Graydon Gray, James Barry, Carolyn Lewis, Dorothy Bryan, David Fashion, J. P. Peagler, and Roy Strickland were members of the Berkeley County School District Board of Trustees at the time of Plaintiff's nonrenewal.

4. In the Spring of 1980, at which time Plaintiff was assigned a guidance counselor position at Cross High School, the Berkeley County School District Board of Trustees voted not to renew her contract of employment with the District for the next school year based on the following events.

5. On January 23, 1980, Ms. Glenna Best, Title I Reading Coordinator for the District, called Mr. Willie E. Ford, principal at Cross High School, and requested permission to administer a Title I reading test to students in Ms. Cynthia Tuttle's class on January 24, 1980, at Cross High School; Mr. Ford granted permission for the test.

6. On January 24, 1980, Ms. Best went to Cross High School for the purpose of administering the Title I reading test; she was accompanied by Ms. Gwen Bailey.

7. Ms. Tuttle, the classroom teacher whose students were being tested, voiced no objection to the test on January 24,

1980, or at any time prior thereto.

8. It was agreed that the test would be given in the school library; accordingly, Ms. Best and Ms. Bailey proceeded to set up materials in the conference room of the library.

9. On the morning of January 24, Ms. Best left the conference room to go into the main room of the library to explain the test to the students; at that time she was encountered by Plaintiff who told her that she was not going to test the students because she (Moore) did not have any knowledge of the test and parental permission had not been obtained. Ms. Best explained that parental permission was not necessary and offered to let Plaintiff examine the test.

10. Plaintiff directly addressed the students and told them they did not have to take the test, and if they did, she would call their parents and help them "cut their behinds."

11. Mr. Ford was summoned to resolve the matter.

12. Plaintiff had no responsibility for the administration of Title I reading tests.

13. As a result of Plaintiff's interference, the ongoing educational program of the high school was interrupted, and Ms. Best was prevented from administering the test.

14. Ms. Best prepared a written report of the incident which was submitted to Mr. Bonner.

15. By letter dated February 1, 1980, Mr. Bonner requested Plaintiff to provide him with her account of the January 24 incident. Plaintiff responded with a two-sentence letter on February 8, 1980, which gave no account.

16. By letter dated February 19, 1980, Superintendent Bonner informed Plaintiff that her reply was not satisfactory and

requested a detailed account of the January 24 incident. Mr. Bonner's letter warned Plaintiff that her response might have a bearing on her reemployment for the 1980-81 school year. Plaintiff responded almost a month later with a request for a written account of the charges against her, if any, and the name of the individual making the charges. She also requested an open hearing before the Board. No information concerning the January 24 incident was provided in her letter.

17. By letter dated April 1, 1980, Mr. Bonner informed Plaintiff that, because she had deliberately disregarded his instructions in the February 19 correspondence, he was planning to recommend to the Board that her contract not be renewed for the next school year and that if the Baord upheld her recommendation, she would be given an opportunity for a hearing on the matter.

18. On April 10, 1980, the Board of

Trustees voted not to renew Plaintiff's contract for the 1980-81 school year.

19. By letter dated April 15, 1980, Mr. Bonner informed Plaintiff of the Board's decision not to renew her contract and informed her of her right to a hearing before the Board.

20. By letter dated April 30, 1980, Mr. Bonner informed Plaintiff's attorney, in detail, of the charges against Plaintiff.

21. On May 6, 1980, a hearing was held before the Defendant Board of Trustees concerning Plaintiff's nonrenewal. The hearing was conducted pursuant to the provisions of the South Carolina Teacher Employment and Dismissal Act, S.C. Code Ann. § 59-25-410 et seq. (1976 & Supp. 1981). At the hearing, the Superintendent had the burden of establishing that good and just cause existed for the decision to nonrenew Plaintiff's contract. At the hearing, Plaintiff was represented by counsel, was allowed to

present testimony and cross-examine witnesses. No pre-hearing discovery was conducted by Plaintiff although such was available to her under the South Carolina Employment and Dismissal of Teachers Act.

22. By letter dated May 16, Plaintiff was informed that on May 15, 1980, a majority of the Board voted to uphold the prior determination not to renew her contract for the reasons of Plaintiff's unprofessional conduct and insubordination in regard to the January 24th incident and its aftermath.

CONCLUSIONS OF LAW

A. Jurisdiction

1. The court has jurisdiction of the subject matter of Plaintiff's claims pursuant to 28 U.S.C. §§ 1331 and 1343.

B. Directed Verdict

2. The standard to be applied in considering a motion for directed verdict has been articulated by the Supreme Court as follows:

> When, on the trial of the issues of fact in an action at law before a Federal court and jury, the evidence, with all the inferences that justifiably can be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant...so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.
>
> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon which the onus of proof is imposed."

Gunning v. Cooley, 281 U.S. 90, 93-94 (1930).

3. The Fourth Circuit follows this formulation. Beaty Shopping Center, Inc v. Monarch Insurance Co., 315 F.2d 467, 469 (4th Cir. 1963); Grooms v. Minute-Maid, Inc., 267 F.2d 541, 543 (4th Cir. 1959).

4. The Fourth Circuit has held that a trial court has a duty to direct a verdict

"where the evidence is so clear and conclusive that reasonable men can draw but one inference therefrom." Holmes v. Holland Furnace Co., 103 F.2d 563, 564 (4th Cir. 1939).

C. Plaintiff's First Amendment Claim

5. The First Amendment to the U.S. Constitution provides that "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assembly...." Plaintiff's First Amendment claim is brought pursuant to 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usuage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

6. In order for Plaintiff to prove

a First Amendment violation, she must prove (1) that her conduct was constitutionally protected; and (2) that the conduct was a substantial or motivating factor in the decision to nonrenew her contract of employment. If Plaintiff meets this burden, the Defendants have the opportunity to show, by a preponderance of the evidence, that they "would have reached the same decision as to [Plaintiff's] reemployment even in the absence of the protected conduct." Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

7. Plaintiff's contention that the nonrenewal of her contract in 1980 was in retaliation for her public support of civil rights of blacks and advocacy of rights of black students since the beginning of her employment with the District is so unsupported by the evidence in the reocrd that reasonable minds could not differ that it was not Plaintiff's advocacy that motivated

her discharge. Rather, the evidence is clear and conclusive that Plaintiff's advocacy of civil rights had nothing to do with the reasons for her nonrenewal.

8. The First Amendment does not protect speech or conduct which has the effect of materially disrupting classwork or which involves substantial disorder or invasion of the rights of others. Connick v. Myers, 103 S.Ct. 1684, 1690 (1983); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Pickering v. Board of Education, 391, U.S. 563 (1968). Plaintiff's speech and conduct on the morning of January 24, 1980, which had the effect of disrupting the Title I reading class by resulting in a cancellation of a scheduled and proper classroom test and Plaintiff's subsequent failures to respond to the Superintendent's repeated requests for information concerning the incident was not protected by the First Amendment. Even if Plaintiff met her burden

of establishing that she engaged in protected constitutional conduct that was a substantial or motivating factor in the decision not to renew her contract, the evidence is so clear and conclusive that reasonable minds could not differ that the Board would have reached the same decision in regard to Plaintiff's reemployment; this evidence consisted of proof of Plaintiff's unprofessional conduct on January 24, 1980, in which she prevented the administration of a Title I reading test by the Title I Reading Coordinator and her subsequent insubordinate conduct of repeated failure to respond to Superintendent Bonner's requests for her account of the incident.

D. Plaintiff's Fourteenth Amendment Procedural Due Process Claim

9. Plaintiff asserts the following procedural due process claims under the Fourteenth Amendment:

a) Claim of inadequate notice;

b) Claim of inadequate statement of reasons for the decision;

c) Claim that hearing held subsequent to decision to nonrenew violates due process;

d) Claim of biased tribunal;

e) Claim that Board must possess academic expertise;

f) Claim of failure to follow procedural rules designed to protect Plaintiff.

10. The Fourth Circuit has set forth the following procedural due process requirements with respect to the nonrenewal of a teaching contract: (1) adequate notice, (2) specification of the charges against the teacher, (3) an opportunity to confront adverse witnesses, and (4) an opportunity for the teacher to be heard in her own defense. Satterfield v. Edenton-Chowan Board of Education, 530 F.2d 567 (4th Cir. 1975); Vance v. Chester County Board of School Trustees, 504 F.2d 820 (4th Cir. 1974).

11. Plaintiff's claim of inadequate notice is so unsupported by the record

evidence that reasonable minds could not differ that she had notice of the charges against her. Defendant Bonner's letters of February 1 and February 19, 1980, clearly informed Plaintiff she had been charged with interfering with the administration of a Title I reading test and thereby interrupting the ongoing educational process; Defendant Bonner's letter of April 1, 1980 notified Plaintiff of the charge of insubordination and of her right to a hearing; and Defendant Bonner's April 30, 1980 letter to Plaintiff's then-counsel set forth the reasons for the recommendation of nonrenewal in detail.

12. A directed verdict for the Defendant's is appropriate on Plaintiff's claim of inadequate statement of reasons for the Board's decision to nonrenew Plaintiff's contract of employment. Following the May 6 hearing, the Board informed Plaintiff of its decision by letter dated May 16, 1980, in which it set forth the reasons for non-

renewal which were unprofessional conduct and insubordination. Such a statement of reasons for nonrenewal is sufficient under Satterfield v. Edenton-Chowan Board of Education, supra.

13. Plaintiff's claim that the May 6 hearing violates due process because it was held subsequent to the initial decison to nonrenew her contract must fail because the due process clause does not require that a hearing be held before an initial decision regarding the nonrenewal of a public employee's contract is reached. Arnett v. Kennedy, 416, U.S. 135 (1974); Blair v. Robston Independent School District, 556 F.2d 1331 (5th Cir. 1977), cert. denied, 437 U.S. 905 (1978); Satterfield v. Edenton-Chowan Board of Education, supra; Vance v. Chester County Board of School Trustees, supra. See Withrow v. Larkin, 421 U.S. 435 (1975).

14. Plaintiff offered no proof to sup-

port her claim of a biased tribunal. In order to disqualify a hearing tribunal, actual bias rather than the mere potential for bias must be shown. Blayer v. Robston Independent School District, supra; Megill v. Board of Regents, 541 F.2d 1073 (5th Cir. 1976); Hillman v. Elliott, 436 F. Supp. 812 (W.D. Va. 1977). Plaintiff established no particularized fact showing actual bias or interest. Accordingly, due process is not violated even though the hearing was before the same board that approved the initial decision to nonrenew the contract. Horton-ville Joint School District No. 1 v. Horton-ville Education Association, 426 U.S. 42 (1976). Although the hearing tribunal consisten of the same board members who previously voted to accept the Superintendent's recommendation subject to their right to review the matter on the merits, and pursuant to S.C. Code Ann. § 59-25-410 et seq. (1976) & Supp. 1981), this fact alone is not suf-

ficient to disqualify the hearing officers. Megill v. Board of Regents, supra; Satterfield v. Edenton-Chowan Board of Education, supra; Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512 4th Cir. 1974); Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971); Coleman v. Elliott, supra; see Withrow v. Larkin, supra. Moreover, Plaintiff raised no objection to the tribunal as being impartial prior to the hearing. It is well established that objections to the qualifications of a hearing officer must be made as soon as facts tending to disqualify the hearing officer become known or they are deemed waived. Satterfield v. Edenton-Chowan Board of Education, supra; Duffield v. Charleston Area Medical Center, Inc., supra. Plaintiff did not object to the Board's qualifications on the grounds of impartiality at the time of the hearing.

15. Plaintiff's claim challenging the sufficiency of the hearing on the ground

that the hearing tribunal lacked academic expertise must fail because the due process clause does not require that a hearing officer possess academic experience in order to pass upon the nonrenewal of a teaching contract. See Satterfield v. Edenton-Chowan Board of Education, supra. Neither the Fourth Circuit nor the United States Supreme Court has imposed a requirement of academic expertise in hearing tribunals in cases dealing with teachers. Moreover, the issue before the Defendant Board involved Plaintiff's insubordinate and unprofessional conduct and such an issue is not restricted to the domain of academic experts.

16. Plaintiff's claim that the Defendants failed to adhere to written policies adopted by the Defendants regarding teacher dismissals and contract renewals must fail since an examination of these policies shows they do not apply to the circumstances of the instant case. The policy referred to

addresses a situation involving an identified deficiency in job performance in which discussion of the problem and assistance may remedy the situation. Plaintiff's interference with the ongoing educational process by attempting to stop the administration of a classroom test and her insubordination by failing to explain her actions as requested are not deficiencies subject to improvement. Even if the policies are deemed applicable, no denial of due process results from noncompliance. The policies are local rules adopted by the Defendant District and, insofar as they provide for a conference with the teacher and disclosure of all evidence against the teacher, go beyond the minimum requirements of constitutional due process. Noncompliance with state disciplinary regulations which go beyond constitutional requirements does not result in a denial of due process. Brandywine Aff. NCCEA/DSEA v. Brandywine Board of Education, 555 F.

Supp. 852, 861 (D. Del. 1983); Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976); Attencio v. Board of Education, 658 F.2d 940 (4th Cir. 1981), cert. denied, 102 S.Ct. 1976. Finally, at most, the failure to provide Plaintiff with a conference and evidence against her would have given her the opportunity to rebut the charges and present her side of the incident. The Defendants gave Plaintiff two such opportunities, the first with Defendant Bonner's letters in which he requested her account of the incident and second with the May 6 hearing. At the May 6 hearing, all evidence against Plaintiff was presented and Plaintiff was allowed to present her account of the incident. The hearing was sufficient to cure any procedural defects which might have stemmed from the alleged noncompliance with the District policies. See Perry v. Sindermann, 408 U.S. 593 (1972); Hillman v. Elliott, supra; Nichols v. Lynchburg Training School and

Hospital, 422 F. Supp. 672, 674 (W.D. Va. 1976).

Accordingly, Defendants' Motion for Directed Verdict is granted with respect to Plaintiff's First Amendment claim and procedural due process claim, and it is hereby ordered that these claims be dismissed.

AND IT IS SO ORDERED.

/s/
Falcon B. Hawkins
United States District Judge

Charleston, South Carolina

May 25, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

WILHELMINA MOORE,

Plaintiff,

vs.

HENRY E. BONNER, et al,

Defendants.

CIVIL ACTION NO.
80-1540-1

ORDER

This matter came on for hearing before the court on April 26, 1984, upon plaintiff's motion pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, for a judgment notwithstanding the verdict, or, in the alternative, for a new trial. The Plaintiff, Wilhelmina Moore, asserts the following grounds in support of her motion:

1. Based on the evidence adduced at trial, the only reasonable conclusion a jury could have reached was that the plaintiff was discharged in violation of 42 U.S.C. § 1983 and the equal protection clause of the fourteenth amendment to the United Stats Constitution;

2. At the close of the plaintiff's case, the court erred in directing a verdict against plaintiff on her first

amendment and procedural due process claims;

3. The jury's verdict is against the clear weight of evidence, or is based on false evidence, or will result in a miscarriage of justice;

4. During the trial proceedings, the court committed prejudicial error by (a) not allowing plaintiff's expert witness to testify, (b) not allowing plaintiff to present directly to the jury proof of defendants' noncompliance with an August 1981[1] court order requiring desegregation, and (c) not charging the jury that plaintiff had proven a recent history of racial discrimination or intentional segregation; and,

5. Prejudicial error arising from the court's denial of all other previous exceptions, objections and arguments made on behalf of plaintiff.

For the reasons stated below, this court is of the opinion that plaintiff's motion should be denied.

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[1]Plaintiff asserts that it was an August 1981 court order at issue. This is not so. Rather, the court orders at issue are an August 12, 1970, order and a September 2, 1970, supplemental order. See United States of America vs. Berkeley County School District, et al., Civil Action No. 70-605 (1970). This court will assume that plaintiff's argument is in reference to these orders.

THE APPLICABLE STANDARDS OF REVIEW

The standard for a judgment notwithstanding the verdict and directed verdict is identical. When considering either motion, the court must view the evidence "in the light most favorable to the party in whose favor the verdict has been returned, and all conflicts must be resolved in his favor." Hawkins v. Sims, 137 F.2d 66, 67 (4th Cir. 1983). The United States Supreme Court has articulated the standard as follows:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict.

Brady v. Southern Ry, Co., 320 U.S. 476, 479-480, 64 S.Ct. 232, 234 (1943) (emphasis added). Accord, Holmes v. Holland Furnace Co., 102 F.2d 563, 564 (4th Cir. 1939).

In determining whether a motion for new trial should or should not be granted:

> [a judge] may, ... set aside a verdict supported by substantial evidence where in his opinion it is contrary to the clear weight of the evidence, or is based upon evidence which is false; for, even though the evidence be sufficient to preclude the direction of a verdict, it is still his duty to exercise his power over the proceedings before him to prevent a miscarriage of justice .... Verdict may be set aside and new trial granted, when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice.

Garrison v. U. S., 62 F.2d 41, (4th Cir. 1932).

PLAINTIFF'S ARGUMENTS

As the first ground in support of her motion for a judgment notwithstanding the verdict, plaintiff asserts that the only reasonable conclusion a jury could have reached was that the plaintiff was discharged in violation of 42 U.S.C. § 1983 and the equal protection clause of the four-

teenth amendment to the United States Constitution.

The evidence in the record, however, is such that reasonable men could not disagree that plaintiff's discharge from her employment was not because of her race but was the result of her unprofessional and insubordinate behavior. The record is replete with testimony concerning plaintiff's behavior at Cross High School on January 24, 1980, in which she interfered with the ongoing instructional program of the school district by preventing the administration of the Title I reading test by Ms. Glenna Best. The defendants introduced testimony of four eyewitnesses to the incident (Ms. Glenna Best, Ms. Gwen Bailey, Ms. Lillie Heyward, and Ms. Janie Smalls), all of whom testified that plaintiff acted inappropriately on January 24, 1980, and told the students they did not have to take the test. They all testified that plaintiff acted in a

loud and unprofessional manner in the presence of the students. Moreover, the exhibits in the record establish that subsequent to her conduct on January 24, 1980, plaintiff failed to respond to the repeated requests of Superintendent Bonner to provide a written account of the incident. The record evidence also established that the January 24, 1980, incident and its aftermath did not constitute the first time plaintiff acted inappropriately in regard to her employment with the School District. See e.g. plaintiff's exhibits 2, 3, 4 and 5.

When viewed in a perspective most favorable to the defendants, reasonable minds could not disagree that plaintiff's discharge was based on her unprofessional and insubordinate behavior and not her race. Accordingly, the jury verdict must stand.

As the second ground in support of her motion for a judgment notwithstanding the verdict, the plaintiff argues that the

court erred in directing a verdict against the plaintiff on her first amendment and procedural due process claims.

It is clear from the language of Rule 50(b), Federal Rules of Civil Procedure, that a party may not move for judgment notwithstanding the verdict when the court has granted the opposing party's motion for directed verdict.

> When a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

It is evident that a motion for judgment notwithstanding the verdict is to correct a finding of the jury which is con-

trary to the evidence. In the instant case, the first amendment and procedural due process claims were never submitted to the jury because the court found them lacking as a matter of law. (See companion order of this court entered simultaneously herewith.) Plaintiff's recourse under these circumstances is to appeal the directed verdict in the defendants' favor pursuant to the Federal Rules of Appellate Procedure.

In the alternative, plaintiff asks the court to grant her a new trial on the grounds that the verdict of the trial jury is against the clear weight of the evidence, or is based upon false evidence, or will result in a miscarriage of justice.[2] Plaintiff further asserts that the court committed

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[2]Plaintiff does not indicate how the verdict was against the clear weight of the evidence, or how it will result in a miscarriage of justice, or how it was based upon false evidence. After carefully searching the record, the court concludes that these claims are without merit.

error in:

(1) Failing to allow Dr. Joseph Ryan to testify as an expert witness;

(2) Failing to allow plaintiff to present directly to the jury proof of noncompliance with a desegregation court order;

(3) Failing to charge the jury that plaintiff had proved a recent history of racial discrimination or intentional segregative action within the school district; and,

(4) Overruling all other exceptions, objections, and arguments on behalf of plaintiff.[3]

The Fourth Circuit has held that "[t]he admission or exclusion of expert evidence is within the broad discretion of the trial judge and his action is to be sustained unless manifestly erroneous." Boleski v. American Export Lines, Inc., 385 F.2d 69, 71 (4th Cir. 1967). Dr. Ryan was qualified

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[3]Plaintiff fails to identify the exceptions, objections and arguments referred to as well as the grounds upon which the court erred in denying them. After carefully searching the record, the court is of the opinion that these claims are without merit.

as an expert in the field of testing measurement. Apparently, he was called to testify concerning what he perceived to be the validity of plaintiff's concerns regarding the test that was to be given by Ms. Best on January 24, 1980. Dr. Ryan's testimony was irrelevant to the basis on which defendants acted and also to plaintiff's claims. Whether or not the expert considered the plaintiff's concerns to be valid was not at issue. Rather, it was plaintiff's conduct and behavior as she interfered with the giving of the test, her subsequent refusals to cooperate with the Superintendent's attempts to investigate the matter, and the School Board's perception of her actions which were at issue. Accordingly, it was proper for the court to exercise its discretion to disallow the testimony of Dr. Ryan.

Plaintiff asserts that it was error for the court to refuse to allow her to present directly to the jury proof of non-

compliance by the defendants with the 1981 desegregation order concerning Berkely County School District. In addition, she argues that it was error for the court to fail to charge the jury that the plaintiff had proven a recent history of racial discrimination or intentional segregative action within the School District. No error was committed in regard to either of these matters. The court clearly charged the jury that the defendants in this action had the burden of justifying their conduct by clear and convincing evidence. The proper purpose of offering evidence on the issue of compliance with the order would have been only to shift the burden to the defendants of justifying their conduct by clear and convincing evidence. See Knighton v. Laurens County School District No. 56, 721 F.2d 976 (4th Cir. 1983). Since the court shifted the burden to the defendants, it was not error for the court to not allow

evidence concerning compliance with the order to go to the jury. It is, therefore,

ORDERED, that plaintiff's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, be, and the same is hereby, denied.

AND IT IS SO ORDERED.

/s/

FALCON B. HAWKINS
United States District Judge

Charleston, S. C.

May 25th, 1984.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1595

Wilhelmina Moore,

Appellant,

versus

Henry E. Bonner, et al,

Appellees.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Falcon B. Hawkins, District Judge. (C/A No. 80-1540)

Submitted: December 28, 1984
Decided: March 25, 1985

Before SPROUSE and [illegible]PMAN, Circuit Judges, and BUTZNER, Senior [illegible]ircuit Judge.

(Wilhelmina Moore, Appellant Pro Se. R. Markley Dennis, Jr., Kenneth L. Childs, and David T. Duff for Appellees.)

PER CURIAM:

Wilhelmina Moore appeals from the judgment of the district court entered against her on her civil rights complaint against Henry E. Bonner, the Superintendent of Berkeley County Schools; the individual members of the Berkeley County Board of Education; and the Berkeley County School District. Moore's complaint challenged, on First and Fourteenth Amendment grounds, the nonrenewal of her contract position as a guidance counselor at Cross High School, Berkeley County, South Carolina. The district court, at the close of the evidence, directed a verdict against Moore on her First Amendment claim and on her Fourteenth Amendment procedural due process claim. Moore's claim that her discharge was in violation of the equal protection clause of the Fourteenth Amendment was resolved against her by a jury.*

Moore alleges on appeal that the district court erred in directing a verdict on her First Amendment and procedural due process claims; erred in excluding evidence of the School District's noncompliance with a 1970 desegregation order; and erred in not instructing the jury that the school had a recent history of segregation or intentional segregative action.

Moore, a black woman, was employed by the Berkeley County School District for seventeen years. During the last eleven of those years, she worked as a guidance counselor at Cross High School. Shortly after Moore began work at Cross, the School District, pursuant to a suit brought against it by the United States, was ordered to desegregate. United States of America v.

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*The district court originally dismissed Moore's complaint on res judicata grounds. Moore v. Bonner, 526 F. Supp. 143 (D.S.C. 1981). This judgment was reversed on appeal. Moore v. Bonner, 695, F.2d 799 (4th Cir. 1982).

Berkeley County School District, C/A No. 70-605 (D.S.C. 1970). Moore presented evidence at trial, however, that Cross remained 92% black up through 1983.

In the spring of 1980, the Berkeley County School Board voted not to renew Moore's contract, finding her guilty of unprofessional conduct and insubordination. The series of events leading up to the nonrenewal began on January 24, 1980, when the school District's Title I reading coordinator came to Cross to administer a reading test to students in the Title I Program. Some of the students in the Program approached Moore, who as guidance counselor was involved in the administration of aptitude and state-required tests, to question her about the upcoming examination. Moore, who had not been informed of the test, went to the testing location to investigate and to determine why neither she nor the parents had been notified. Moore and the reading coordinator

became involved in a heated dispute, and Moore informed the students that they did not have to take the test. The tests were cancelled for that day due to the disturbance. Moore was later informed that her duties did not include involvement with the Title I Reading Program or tests administered through that Program.

The reading coordinator thereafter complained to School District officials about Moore's behavior, prompting Superintendent Bonner to demand an account of the incident from Moore. Moore submitted a brief response which Bonner found inadequate. A more detailed explanation was demanded, with the suggestion that Moore's reply could affect the renewal of her contract. Moore provided no further information but asked to know the charges against her and requested a public hearing before the School Board. Bonner then recommended to the Board that Moore's contract not be renewed because

Moore had "deliberately disregarded" his instructions to provide a fuller account of her behavior. The Board, meeting in executive session, unanimously adopted Bonner's recommendation.

Moore appealed the Board's decision pursuant to the South Carolina Teacher Employment and Dismissal Act, which entitled her to a formal hearing before the Board. S.C. Code Ann. § 59-25-470 (Supp. 1983). Moore was represented by counsel at this hearing and presented witnesses in her behalf. The Board voted to uphold its initial decision not to renew Moore's contract. Moore filed suit in district court, seeking reinstatement and damages.

In directing a verdict against Moore on her First Amendment claim, the district court found no evidentiary support for Moore's allegation that her nonrenewal was in retaliation for her support of civil rights since the beginning of her employment.

The district court further found that Moore's speech and conduct on January 24, 1980 disrupted the functioning of the Title I reading class by resulting in the cancellation of a scheduled and proper test. In light of the interruption in the fulfillment of the school's responsibilities caused by Moore's behavior, the district court concluded that the resulting nonrenewal of her contract did not violate the First Amendment. See Connick v. Myers, _____ U.S. _____, 51 U.S.L.W. 4436, 4439 (April 20, 1983).

We agree with the reasoning of the district court. We have no trouble finding, as required by Supreme Court precedent in this area, that Moore's expression of concern about the testing procedure was an expression upon a matter of legitimate public interest. See Connick, supra at 4337-38. Moore's concern was that the students would fare poorly upon the test because it was being administered without

warning by a stranger of a different race. Moore also was concerned about the reaction of parents who had not been notified that the testing was to take place.

The First Amendment inquiry goes further, however. The employee's interest in making the statement must be weighed against the employer's "interest in effective and efficient fulfillment of its responsibilities to the public." Connick, supra at 4439. The balance to be struck between these interests is a question of law for the courts. Connick, supra at 4439 n.10; Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984). And relevant to this determination is the time, place and manner in which the expression was made.

The district court found that the School District's interest in the functioning of the Title I Program outweighed Moore's First Amendment interest in expressing her position on the testing procedure. Consider-

ing the means adopted by Moore -- informing the students that they did not have to take the test rather than consulting the principal on the propriety of the testing -- we find no error in the district court's conclusion that the interests of the employer outweighed those of the employee in this instance.

Nor do we find any error in the district court's determination that the procedures surrounding the nonrenewal of Moore's contract satisfied due process. As recognized by the district court, the due process requirements with respect to the nonrenewal of a teaching contract are: (1) adequate notice, (2) specification of the charges, (3) an opportunity to confront adverse witnesses, and (4) an opportunity for the teacher to be heard in her own defense. Satterfield v. Edenton Board of Education, 530, F.2d 567 (4th Cir. 1975). The reocrd clearly established that Moore was afforded these protections.

Contrary to Moore's contention, a pre-termination hearing is not required. Arnett v. Kennedy, 416 U.S. 135 (1974). Nor does the fact that the Board previously had voted not to renew her contract disqualify it from hearing her appeal, particularly where Moore failed to raise any objections to the impartiality of the tribunal prior to the hearing. Satterfield, supra at 574. Finally, the failure of the School District to afford Moore a conference prior to not renewing her contract amounts to no more than a violation of the District's own policies and does not implicate the protections of the due process clause. Goodrich v. Newport News School Board, 743 F.2d 225 (4th Cir. 1984).

Lastly, we turn to Moore's challenge to the jury verdict against her on her equal protection claim. Moore contends that the district court erred in excluding evidence of the School District's noncompliance

with court-ordered desegregation and in failing to instruct the jury that she had proven a recent history of racial segregation or intentional segregative action on the part of the School District. We find no reversible error in either of these contentions in light of the district court's admission of Moore's statistical evidence concerning the racial composition of the District schools and its instruction to the jury that the School District had the burden of justifying the nonrenewal of Moore's contract by clear and convincing evidence.

Under our decision in Knighton v. Laurens County School District No. 56, 721 F.2d 976 (4th Cir. 1983), proof of a recent history of segregation or intentional segregative action has the effect of shifting to a school district the burden of proving by clear and convincing evidence that the nonrenewal was justified by nondiscriminatory considerations. See also Keyes v. School

District No. 1, 413 U.S. 189, 208-10 (1983); Evans v. Harnett County Board of Education, 684 F.2d 304 (4th Cir. 1982). Moore's evidence of noncompliance with the district court's 1970 desegregation order would have been relevant to establish either a recent history of segregation or intentional segregative action. Proof of such noncompliance was not, however, necessary to establish either of these facts, as statistical proof of a recent history of segregation was adequate to shift the burden of proof to the School District. Having admitted Moore's statistical evidence, the district court legitimately could have concluded that proof of compliance or noncompliance with the court order would have been cumulative and led to needless confusion of the issues. See Fed. R. Evid. 403. We find no abuse of discretion in its decision to exclude the evidence. With regard to the district court's instructions, the critical point

as far as Moore's case was concerned was the shifting of the burden of proof to the School District. Moore does not dispute that the district court correctly instructed the jury on the burden of proof, and we find no reversible error in its alleged failure to instruct that Moore had proved a recent history of segregation.

For the aforestated reasons, the judgment of the district court is affirmed. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument.

AFFIRMED.